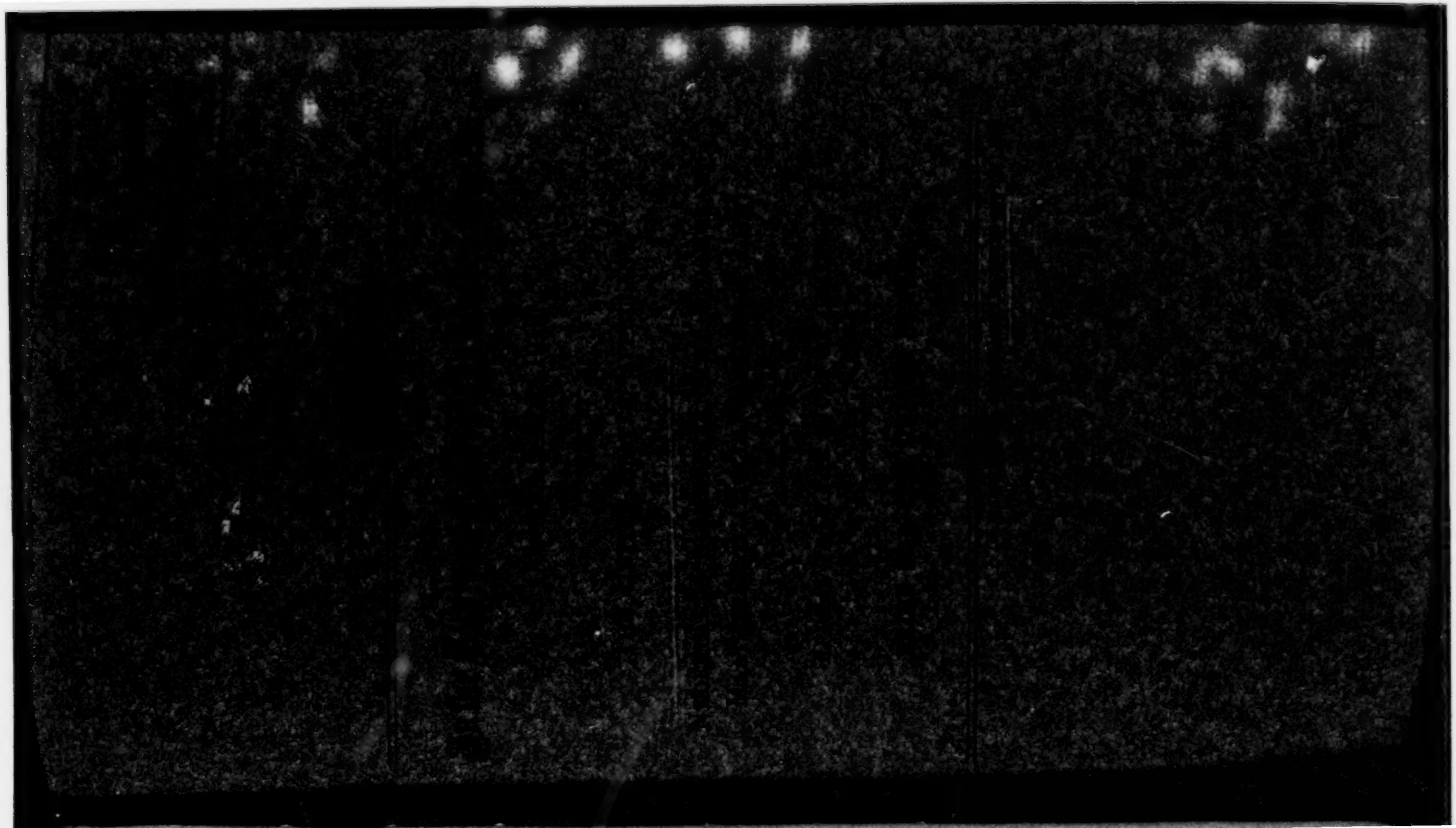

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, APPELLANT,
v.
NEDERLANDSCH-AMERIKAANSCHE STOOMVAART MAATSCHAPPIJ (HOLLAND-AMERICA LIJN). } No. 200.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal by the Government from a judgment of the Court of Claims in favor of appellee for the sum of $16,993.50 paid by appellee to the United States Commissioner of Immigration between May 27, 1908, and December 9, 1913. The payments were made to recompense the Government for the exact cost to it of the maintenance and medical treatment of aliens brought to New York by appellee during the period of detention of such aliens prior to admission to the United States. (Finding IV, R. 9).

The statute under which this expense was charged and collected reads (Sec. 16 of the act of February 20, 1907, 34 Stat. 898):

> That upon the receipt by the immigration officers at any port of arrival of the lists or manifests of incoming aliens provided for in sections twelve, thirteen, and fourteen of this

> act, it shall be the duty of said officers to go or to send competent assistants to the vessel to which said lists or manifests refer, and there inspect all such aliens, or said immigration officers may order a temporary removal of such aliens for examination at a designated time and place, but such temporary removal shall not be considered a landing, nor shall it relieve the transportation lines, masters, agents, owners, or consignees of the vessel upon which said aliens are brought to any port of the United States from any of the obligations which, in case such aliens remain on board, would, under the provisions of this act, bind the said transportation lines, masters, agents, owners, or consignees: *Provided*, That where a suitable building is used for the detention and examination of aliens the immigration officials shall there take charge of such aliens, and the transportation companies, masters, agents, owners, and consignees of the vessels bringing such aliens shall be relieved of the responsibility for their detention thereafter until the return of such aliens to their care.

This is a substantial reenactment of section 16 of the former act of March 3, 1903 (32 Stat. 1213–17). Under this statute as well as under previous statutes on the same subject, departmental regulations required the expenses incurred in the examination and detention of aliens to be paid by the steamship companies; and the regulation under the statute of 1907 required examination and detention on board ship if the payment of such expenses was refused. (Rule 13, R. 22–23.)

The practice as to examining and detaining aliens is fully set forth in Findings II to VII, inclusive (R. pp. 8–11), and has been in effect at least since 1891.

During the period covered by this case the Government maintained at Ellis Island suitable buildings used by it for the detention and examination of alien immigrants.

In July, 1894 (Finding VIII, R. 11), appellee, together with other steamship companies, disclaimed liability for the expense of maintenance on Ellis Island of any aliens except those afterwards deported. The Commissioner of Immigration at Ellis Island, acting under instructions from the Superintendent of Immigration at Washington, inspected all aliens on board the next incoming steamship belonging to appellee. Upon inquiry being made as to the reason for this, the Commissioner of Immigration notified appellee of his understanding that the appellee, and other like companies, refused to continue paying for the maintenance of immigrants detained for examination, but that if satisfactorily notified by appellee that it agreed to pay such maintenance charges it would be permitted to send such aliens to Ellis Island as formerly. In response to this notice the appellee sent to the United States Commissioner of Immigration the following letter (R. 12):

NEW YORK, *July 25, 1894.*

DR. J. H. SENNER,
U. S. Commissioner of Immigration,
Ellis Island, N. Y. Harbor.

DEAR SIR: In reply to your yesterday's favor I now beg to inform you that the

Netherlands-American Steam Navigation Company will, until the matter is decided differently by proper authority, continue to pay the cost of maintenance pending examination at Ellis Island of all immigrants brought by their steamships to the port of New York, and that we are ready to give bond to that effect.

Please inform me, if this meets with your requirements, so as to secure the examination of immigrants arriving by our steamers at Ellis Island, as heretofore.

To which the commissioner replied (R. 12):

OFFICE OF THE
U. S. COMMISSIONER OF IMMIGRATION,
Ellis Island, New York Harbor, July 26, 1894.

NETHERLANDS-AMERICAN STEAM NAVIGATION COMPANY,
39 Broadway, New York.

GENTLEMEN: Replying to your letter of the 25th instant, in further reference to the payment of maintenance bills of immigrants detained at this station for examination, I beg to say that the statement made by you therein is satisfactory and that passengers arriving by vessels of your line will be examined at Ellis Island instead of upon shipboard.

Respectfully, yours,
(Signed) DR. J. H. SENNER,
Commissioner.

In 1893 the Superintendent of Immigration, with the approval of the Secretary of the Treasury, adopted rules requiring such expenses to be borne by the steamship companies as formerly. New rules

were issued from time to time, but no substantial change made in this requirement (R. pp. 12–24).

In October, 1907, a claim by the Government for expenses incurred incident to the detention of a certain family of aliens known as the Goth family, was resisted by the Cunard Steamship Company; the Commissioner of Immigration at Ellis Island ruled that the steamship company should pay the bill. The company appealed to the Secretary of Commerce and Labor, and it is stated in a letter from the Solicitor of the Department of Commerce and Labor to the attorney of appellee, dated March 3, 1909 (R. 25), that the Secretary of Commerce and Labor had approved the views expressed in a memorandum of the solicitor that the steamship company was not liable for this expense. The record discloses no ruling by the Secretary of Commerce and Labor; there is nothing to show that the views of the solicitor were adopted by the department and they were not followed. Thereafter the steamship companies, including appellee, declined to pay such expenses, and on September 16, 1909 (R. 26–27), in a letter to the Commissioner of Immigration, stated:

> Under these circumstances, we feel obliged to notify you that we can not be responsible for such expenses, except for a period long enough to enable the examining medical officer to determine definitely the nature of the alien's affliction.

The matter was referred to the Secretary of Commerce and Labor, who, in October, 1909 (R. 27),

informed counsel for appellee that unless the steamship companies would agree to pay the bills for hospital treatment, the aliens suffering from "nondeportable" diseases would be detained on ship. After some further correspondence (R. 27–29) the Commissioner of Immigration on December 16, 1909 (R. 30), advised the counsel for appellee that the Government "could not and would not pay any immigrant hospital bills, nor incur any expenses arising out of treatment of immigrants, whether they be deported or eventually admitted, and that no immigrant could be placed in the Ellis Island Hospital except on the distinct understanding that the steamship company concerned would pay all hospital bills rendered in connection with such immigrant." (The Comptroller of the Treasury had previously ruled (R. 27) that these expenses could not be charged against the appropriation for the expense of regulating immigration.) The steamship companies still disclaiming liability, the commissioner on December 20, 1909, notified appellee as well as other like steamship companies as follows (R. 31–32):

> DEPARTMENT OF COMMERCE AND LABOR,
> IMMIGRATION SERVICE, OFFICE OF THE COMMISSIONER,
> *Ellis Island, New York, N. Y.,*
> *December 20, 1909.*
>
> *To the steamship companies bringing immigrants to New York:*
>
> You have notified this office that you will not hereafter be responsible for the hospital or

maintenance charges of immigrants who on arriving are found to be afflicted with apparently temporary sickness, though such sickness require treatment and though the patients can not until cured be allowed to land under the immigration law. Such immigrants are on your hands, the Government must decline to incur any expense in connection with their care while sick and before landed and furthermore there are no funds available for such purposes.

The Government insists that you are responsible for all such charges, but it can not continue to be put in the position of being compelled to sue for them. It therefore gives you notice that as soon as appropriate arrangements can be made to meet the new situation forced upon it, your immigrants will be subjected to a preliminary medical examination on board ship, in order that those who are physically or mentally unfit to land under the immigration law may be detained on the vessels which brought them and not become charges on the public funds.

You must also be prepared to have sent back to the vessel promptly upon their discovery at Ellis Island, such other cases of sickness covered by your notice as may have escaped the attention of our medical officers at the preliminary examination on board ship. Some time must elapse before the new arrangements can be perfected and in the meantime it may be necessary for the Government to place in hospital a number of cases covered by the terms of your notice. In such in-

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stances you will be held responsible for all expenses in accordance with the practice of the past 20 years.

Should emergency cases arise in which you may wish to have sick immigrants who have been left in your custody receive hospital treatment on shore, the immigration authorities will not stand in the way, provided you signify your willingness to assume the expenses by signing one of the blank forms which have been lodged for this purpose with the immigration and medical officers going on board your vessels.

WM. WILLIAMS,
Commissioner.

On the same day, December 20, 1909, counsel for appellee wrote the Commissioner of Immigration (R. 32) as follows:

DECEMBER 20, 1909.

Hon. WILLIAM WILLIAMS,
Commissioner of Immigration, Ellis Island.

DEAR SIR: Referring to the conference held at your office to-day with the commission of steamship lines in regard to your recent order that arriving aliens be examined on board ship, you will, no doubt, recall that you at first expressed some doubt as to the attitude of the lines toward their liability for hospital and maintenance charges for aliens brought to Ellis Island for examination. There need be no doubt on this subject. The lines admit, and have uniformly admitted, their liability for these charges for such reasonable period as is necessary to enable your officers to examine the aliens. This appears in the record of the

original Toth case. And in the subsequent letters to you defining the attitude of the lines (viz, the letters of the lines of September 26 and November 20, 1909, and my letter of December 17, 1909), the lines referred back to their position as stated in the Toth case and reaffirmed that position.

We have repeatedly mentioned this to you and have discussed with you what period should be considered reasonable for the examination, and at one conference suggested to you that it be the period while the vessel bringing the alien remained in port. But, within the bounds of a reasonable period, the lines admit, and always have admitted, their liability for these charges.

Eliminating, however, these expenses before examination, we understood that you consider it necessary or proper to decline to examine arriving aliens at Ellis Island so as to avoid the possibility of expense to the Government for hospital treatment subsequent to the examination. The committee have accordingly considered the subject as affected by this position of your bureau and have decided that, until further notice, the lines will pay hospital and maintenance charges for detained aliens as heretofore, such payments to be made without prejudice to the claim of the lines that they are not liable for the hospital and maintenance charges of any alien not brought in violation of law except for such reasonable period as may be required for his examination.

In making this reservation of the claim of the lines the committee do not intend that payments made hereafter, until further notice, are to be made under protest, or that actions may be brought to recover such payments.

The foregoing action of the committee was taken on behalf of the foreign passenger lines of the port, and I shall, therefore, ask the lines to write you confirming the action; but, in the meantime, I advise you of the committee's decision without delay.

Yours, truly,

(Signed) LUCIUS H. BEERS.

This letter and agreement were approved by appellee and other companies by a letter addressed to the Commissioner of Immigration (R. 33):

Hon. WILLIAM WILLIAMS,
Commissioner of Immigration,
Ellis Island.

(Re hospital and maintenance charges.)

DEAR SIR: We, the undersigned, hereby adopt the statement of the committee as contained in the annexed letter addressed to you by Mr. Beers, counsel for the committee, under date of December 20, 1909. Until further notice, hospital and maintenance charges for arriving aliens will be paid by us as stated in that letter and on the terms there set forth.

Yours, respectfully,

_____ _____.

LHB/JGM.

Under the contract thus made, which is, in effect, a continuation of the contract made in July, 1894 (ante this brief, pp. 3 and 4, Rec. 12), the appellee, as well

as other steamship companies, continued to pay these expenses until June 3, 1913, when another agreement was entered into (R. 23 and 24) under which the balance of the expenses which are now sought to be recovered were made. The reason for this last agreement is that some time prior to 1913 the United States brought suit against the appellee upon a claim for expenses incurred in the detention of certain immigrants. This case was decided in favor of appellee on May 16, 1913 (205 Fed. 943), and on appeal affirmed February 10, 1914 (212 Fed. 116), and the last agreement was to cover the payment of such expenses during the appeal of this case. The case finally reached this court and was affirmed by a divided court, without opinion, on November 2, 1914 (235 U. S., 686). After the decision by the Circuit Court of Appeals the claimant instituted this suit to recover all payments made by it during the six years preceding the filing of its petition. The claim is to recover payments alleged to have been unlawfully exacted under duress and is not founded upon the Constitution or any law of Congress. The opinion of the Court of Claims shows that in its view the payments were exacted without authority of law under a contract which the appellee by duress was compelled to make, though there is no finding of fact as to whether the payments were made voluntarily or under duress.

SPECIFICATION OF ERRORS RELIED ON.

I. The petition of appellee asserts a claim over which the Court of Claims had no jurisdiction.

II. The findings of fact show either a voluntary payment or payment under duress and therefore preclude a judgment by the Court of Claims.

III. The immigration act of 1907 made the appellee responsible for the payments which it seeks to collect.

ARGUMENT.

I.

The petition asserts a claim over which the Court of Claims had no jurisdiction.

The petition (R. 1–5) after alleging the regulation of the Commissioner of Immigration under which the expenses referred to in the statement were charged to appellee, alleges a threat by that official that if such expenses were not paid by appellee that "thereafter all aliens brought by the vessels of the petitioner would be held on board ship until their application for admission to the United States should be finally adjudicated," that this threat was actually carried out in one instance, and that if enforced it would have occasioned great inconvenience and financial loss to the petitioner and other like steamship companies, and would have caused "a complete disruption of oceanic commerce in the port of New York and the United States." It is then alleged—

> *Consequently, the petitioner paid, under duress and involuntarily, the bills when rendered.*
>
> * * *
>
> *The exaction of such payments from the petitioner and the making of such threats were*

> *entirely without warrant of law.* * * * Petitioner is advised by counsel that under the laws and statutes of the United States as interpreted in said case of the United States of America against Holland-American line, the exaction from petitioner of the above-mentioned hospital charges under duress was *in violation of the rights and privileges* secured to the petitioner as a subject of the Kingdom of the Netherlands under the Constitution of the United States, the treaties between the United States and the Kingdom of the Netherlands and the laws of the United States. * * * *The amounts thus unlawfully exacted from the petitioner and paid by it under duress* * * * were remitted monthly to the Commissioner of Immigration at the port of New York as required by him. * * * (Italics ours.)

The claim thus asserted is not one of which the Court of Claims has jurisdiction. A violation of plaintiff's rights is alleged, consisting of the exaction of money from its unlawfully and by duress by an officer of the United States. This is not a claim founded upon the Constitution of the United States. It is not founded upon any law of Congress or regulation of an executive department, as it is expressly alleged that the regulation and the exaction of payment under it were unlawful. (*Basso* v. *United States*, 239 U. S., 602.) It is a claim sounding in tort, the very gist of its assertion is the denial of any meeting of the minds, of any obligation arising

by way of contract, express or implied. It is a claim for money due, on the ground that the money was unlawfully exacted from claimant by an officer of the United States and parted with by claimant under duress. The Court of Claims has no jurisdiction to entertain such claim and the petition should have been dismissed.

Gibbons v. *United States*, 8 Wall. 269.
Morgan v. *United States*, 14 Wall. 531, 535.
Langford v. *United States*, 101 U. S. 341, 343.
Schillinger v. *United States*, 155 U. S. 163, 169.
Russell v. *United States*, 182 U. S. 516, 530, 535.
Harley v. *United States*, 198 U. S. 229, 234.
Juragua Iron Co. v. *United States*, 212 U. S. 297, 309, 310.
Crozier v. *Krupp*, 224 U. S. 290, 303, 304.
Peabody v. *United States*, 231 U. S. 530, 539.
United States v. *Buffalo Pitts Co.*, 234 U. S. 228, 232.
Basso v. *United States*, 239 U. S. 602.
Tempel v. *United States*, 248 U. S. 121.
Ball Engineering Co. v. *White & Co.*, 250 U. S. 46.

II.

The findings of fact show either a voluntary payment or payment under duress and therefore preclude a judgment by the Court of Claims.

While the petition of claimant is based on the theory that the payments were exacted under duress, it appears from the findings of fact that what the Government officials threatened to do unless the

appellee paid the expenses as formerly, was an act expressly authorized by section 16 of the act of 1907, namely, "To go or to send competent assistants to the vessel * * * and there inspect all such aliens, or said emigration officers may order a temporary removal of such aliens for examination at a designated time and place." The Court of Claims finds (Finding VI, R. 10) that if the aliens "had been examined on board ship or detained there pending their recovery to health without being removed from said vessels serious inconvenience and financial loss to the plaintiff and the public would have resulted." That is, appellee's ships would have been detained in port for considerable periods and the number of trips such ships could make in the business of transporting aliens to this country would have been greatly diminished. The law authorizing the removal to Ellis Island was distinctly to the advantage of appellee and other like steamship companies. They were performing no service for the United States but were transporting aliens to this country as a business, and doing so not even at the invitation of the United States. The examination and detention of aliens was necessary to protect this country so far as possible from the consequences of the business in which the appellee was engaged and was also necessary from humanitarian reasons. The expense had to be incurred and paid; it could not be paid by the aliens; there was no authority for the United States to pay it (Decision of Comptroller of the Treasury, R. p. 27), and therefore it

was properly chargeable to the companies who were primarily responsible for it and for whose distinct advantage the provision for examination and detention at Ellis Island instead of on board ship was made. It does not appear that the steamships were required to have the examination and detention made at Ellis Island; but, on the contrary, this was so greatly to their advantage that they insisted that it be done. The most that can be made out of the attitude of the Government is that the officials took the position that if the steamships desired examination and detention at Ellis Island instead of on board ship, then they must pay the actual expenses incident to the same. In fact, there is no element of duress in the matter. Irrespective of the contracts under which these payments were made, the payments can not be said to have been made under duress which would warrant recovery even if any statute existed by which the claim could be asserted, and are therefore voluntary payments, made without protest and with full knowledge of fact and law.

Cheseborough v. *United States*, 192 U. S. 253;
United States v. *New York and Cuba Mail Steamship Company*, 200 U. S. 488.

The payments, however, were all made under contracts under which the Government forebore from exercising its right to examine and detain on shipboard, and the appellee obtained the benefit of landing aliens at Ellis Island and agreed to pay the expenses as formerly. The first contract was made in 1894 (R. 12), the second, under which practically

all payments now claimed were made, was entered into December 20, 1909. As to this the Court of Claims states in its opinion (R. 39):

> As to the claim of the defendants that the plaintiff bound itself by contract to pay these charges, it is only necessary to say that from the evidence it appears that the plaintiffs were coerced into the making of that contract by a threat of the defendants which, if carried into effect, would have destroyed the plaintiff's business.

Thus it appears that, though the payments were made under contract, the Court of Claims finds that there was such duress that appellee was relieved from the contractual obligations; that therefore there was no contract, and the payments not being in any way authorized by law, were wrongfully and illegally exacted from appellee. If this view be correct, and it is the view upon which the Court of Claims rendered judgment, that judgment is clearly erroneous, for the exaction of the payments on behalf of the Government was tortious. There was no feature or element of contract in it. The Court of Claims has no jurisdiction to enter judgment against the Government on an action sounding in tort. The case of *Gibbons* v. *United States* (8 Wall. 269) is strictly in point. It is there stated (p. 273):

> If such pressure was brought to bear on him as would make the renewal of the contract void, as being obtained by duress, then there was no contract, and the proceeding was a tort

> for which the officer may have been personally liable. If the plaintiff's consent was voluntary, then the contract to which he assented was binding, and must control the case.

In the same case it is stated (p. 274, 275):

> But it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the Government responsible for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents.
>
> * * * * *
>
> The language of the statutes which confer jurisdiction upon the Court of Claims, excludes by the strongest implication demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties.

The claim of appellee is not founded on the Constitution of the United States or upon any law of Congress or regulation of an executive department, and therefore, if the facts warranted the holding by the Court of Claims, it is a case sounding in tort and that court was without jurisdiction. *Gibbons* v. *United States* (supra) and other cases cited at page 14.

The Government takes the position, however, that the payments were made not only under a statute by which they were authorized, but also under definite contracts, made by appellee because it was distinctly to its benefit so to do. That these contracts were entered into with full knowledge of all the facts and of the law, without any protest or reservation on its part in the first contract, and with a positive disclaimer of protest and of intention to sue in the second. In the first contract (R. 12) the appellee agreed, without reservation or protest, that it would, "until the matter is decided differently by proper authority, continue to pay the cost of maintenance." * * *

The payments covered by this contract were from May 14, 1908, to December 20, 1909. On December 20, 1909, the second contract was made (R. 32, 33). By this contract appellee agreed to pay the charges as formerly, stating:

> Such payments to be made without prejudice to the claim of the lines that they are not liable for the hospital and maintenance charges of any alien not brought in violation of law except for such reasonable period as may be required for his examination.
>
> *In making this reservation of the claim of the lines, the committee do not intend that payments made hereafter, until further notice, are to be made under protest, or that actions may be brought to recover such payments.* (Italics ours.)

This language is plain; appellee did not want its agreement to pay to be construed as an admission of its liability, but, so far as the record shows, without any compulsion of any kind it voluntarily stipulated that its reservation of its right to reassert its claims was not intended to attach a protest to its payments or to give notice that it would bring action to recover such payments. In the absence of some showing of coercion requiring that it be made, this statement in the agreement stamps these payments as voluntary.

The only reference to the contract in the opinion of the Court of Claims is that heretofore quoted to the effect that it was no contract because appellee was coerced. It is not clear whether this reference is to the first contract or the second, probably to the first, as no attention whatever is paid by the court to the clear promise of appellee which we have last quoted to pay these expenses without protest and with no intention to sue for recovery. There is absolutely no showing in the record that it was required to make payments without protest, or to make any statement as to its intention to sue for recovery; therefore, by its own written declaration its payments are stamped as voluntary and could not be recovered even if a statute existed authorizing suit to recover such payments improperly exacted.

III.

The immigration act of 1907 made the appellee responsible for the payments which it seeks to collect.

The detention and examination of aliens at Ellis Island was greatly to the advantage of appellee, the United States was under no obligation to detain or examine them there, and at all times had the right to examine and detain such aliens on shipboard. The expense charged was an absolutely necessary expense; it was incurred on account of the business in which appellee was for profit engaged. Appellee brought aliens to this country not by invitation or request of the United States but for the profit it could gain from so doing. The expense of examination and detention was necessarily incident to the enforcement of the statute, and that statute, viewed in the light of all the surrounding circumstances, undoubtedly authorized the regulation imposing the payment of such expenses on the steamship companies, if it did not do so by its express terms.

We here adopt and restate, the argument made by former Assistant Attorney General William Wallace, jr., on this proposition in his brief in the case of *United States* v. *Holland-American Lines*, No. 409, October term, 1914, affirmed by an equally divided court, without opinion (235 U. S. 686).

Interpretation is demanded of section 16 of the immigration act of February 20, 1907 (34 Stat. 898), reading—

"SEC. 16. That upon the receipt by the immigration officers at any port of arrival of the lists or manifests of incoming aliens provided for in sections twelve, thirteen, and fourteen of this act, it shall be the duty of *said officers* to *go* or to *send* competent assistants *to the vessel* to which said lists or manifests refer, *and there inspect all such aliens, or said* immigration *officers may order a temporary removal* of such aliens *for examination at a designated time and place*, but *such temporary removal shall not be considered a landing*, nor shall *it relieve the transportation lines*, masters, agents, owners, or consignees *of the vessel* upon which said aliens are brought to any port of the United States *from any of the obligations which, in case such aliens remain on board, would, under the provisions of this act, bind the said transportation lines*, masters, agents, owners, or consignees: *Provided*, That where a suitable building is *used* for the detention and examination of aliens the immigration officials shall there take charge of such aliens, and the transportation companies, masters, agents, owners, and consignees of the vessels bringing such aliens shall be relieved of the responsibility for their *detention* thereafter until the return of such aliens to their care."

This section 16 was first enacted in the act of March 3, 1903 (32 Stat. 1213–7), section 16 of the latter act being word for word as above quoted, save that the word "incoming" in the second line was lacking.

The House Committee on Immigration and Naturalization, in its report on the bill in 1903 (H. Rept. 982, 57th Cong., 1st sess.), explained the purpose of this section 16 as follows:

"Section 16 repeats the provisions of section 8 of the act of March 3, 1891, as to making examinations of aliens either on board vessel or at such place and time as may be designated, with the proviso that such removal for examination shall not affect the obligations imposed by law upon the vessels, *and aliens, who shall be deemed constructively on board ship until lawfully landed.* It includes a proviso, however, exonerating the masters, etc., of vessels from *responsibility* for the *safe-keeping* of aliens brought by them, respectively, during the time such aliens are held in suitable buildings for investigation of their right to admission by the immigration officers at the port of arrival."

DEPARTMENTAL PRACTICE.

Controversy arose while the act of 1882 was in force; and regulations had been issued for temporary removal, which should not be deemed a landing. (R. 69.) On January 3, 1891, the superintendent asked the Secretary to direct him. On January 17 the latter answered: "The department has uniformly

held that the steamship companies are liable, etc." (R. 71), and directed a continuance of that practice. On February 6, 1891, the Acting Secretary advised the superintendent (R. 75): "Whatever arrangement is agreed upon must be made under the understanding, *heretofore frequently expressed* by the department and *sustained by the courts*, that the temporary removal of the immigrants from on shipboard to a convenient place for examination, *being allowed for the convenience of the importing vessels*, must be made without expense to the Government for the care and support of the detained immigrants until they are discharged.

Soon after the passage of the act of 1891, the North German Lloyd, through counsel, because of section 8 thereof, refused to further pay. On April 28, 1891, the Secretary ordered the superintendent to examine on board, unless the owners would bear these charges; and the latter continued to pay them (R. 77–78). On August 25, 1891, the department said (R. 81):

"This is the *established rule*. The rule is founded in justice. The steamship company should be compelled to pay the detention expenses of immigrants they bring here, whose legal right to land is so uncertain that it takes time and trouble, on the part of the department, to define their status."

In June, 1894, a change of the practice was urged by the owners; but the department said the practice was settled and could not be

reconsidered (R. 85, 49–50). In July, 1894, various owners refused to pay save on *deported* aliens (R. 167); whereupon examination on board was ordered. Defendant's predecessor asked the reason and was told. Whereupon it wrote (R. 176):

"I now beg to inform you that the Netherland's, etc., Co. (the predecessor) *will, until the matter is decided differently by proper authority, continue to pay the cost of maintenance, pending examination at Ellis Island of all immigrants, etc.*"

Other companies in 1898 and 1908–9, continued to agitate the matter. On October 24, 1894, Secretary Carlisle submitted the question to the Attorney General, setting forth the statutes, the uniform practice, the reasons therefor, and the contention of the shipowners. (R. 101–110.) No opinion was given—doubtless because of his previous advice that a like question could be decided only by the courts. (21 Op. 7, 8.)

In July, 1908, the Cunard Line renewed the controversy in the "Toth" case. (R. 80–200.) This culminated in a letter of March 3, 1909, from the solicitor of the department to the attorney of the line, stating that the Secretary approved his (the solicitor's) view—which was that, *if the existing practice were continued*, a procedure *should be* adopted charging the owner to the date when all essential facts bearing on the right to admission were first ascertained—the after expense to be borne by

the Government. His suggestion was never adopted. But on September 16, 1909, because of that letter, defendant and other owners sent a joint letter to the commissioner saying they would not be "responsible for such expenses, except for a period long enough to enable the examining medical officer to determine definitely the nature of the alien's affliction."

Then followed the refusal to pay these bills and this suit.

SPECIFICATIONS OF ERROR RELIED ON.

The assignments of error (R. 232–234) in many ways present the following questions:

1. Does the immigration act of 1907 impose these charges on the defendant?

2. Does it leave the matter as a subject for administrative regulation?

3. Had the defendant, by valid contract, assumed their payment?

ARGUMENT.

I.

The immigration act places responsibility for the care of alien immigrants upon the transportation companies until the aliens have actually been granted the right to enter—and such care necessarily includes hospital treatment.

The historic development of our immigration laws (which, contrary to the assumption of both the lower courts, are essentially restrictive, and not intended to encourage the

incoming of aliens) reasonably demonstrates that Congress never intended that public moneys should be used for the care of aliens between their arrival at our ports and their actual admission after examination by the immigration officers.

In *Hamilton* v. *Rathbone*, 175 U. S. 414, 420, this court said:

" * * * if there were an ambiguity in a section of the Revised Statutes resort might be had to the original act from which the section was taken, to ascertain what if any change of phraseology there is, and whether such change should be construed as changing the law." (See also *Texas Pac. Ry.* v. *I. C. C.* 162 U. S. 197, 218.)

The Federal Government first assumed to regulate immigration, *through its own officers*, by act of March 3, 1875. (18 Stat. 477.) Section 5 of the act provided for the exclusion of certain aliens, for the inspection of every arriving vessel to discover whether obnoxious aliens were on board; that *no* alien *should leave the vessel until the inspection had ended;* and until final decision, the vessel bringing the alien could *not leave port* save by giving bond.

The next act was that of August 3, 1882, section 1 of which levied a "head tax" of 50 cents on each alien brought in. This constituted an "immigrant fund," usable, among other uses, for "the care of immigrants *arriving*" etc., and for "the relief of such as are in distress." These words were carefully restricted to aliens *lawfully landed* (for whom, of course, the companies were no longer responsible), as

is forcibly shown by the language of section 2, which provided that the Secretary should have power to enter into contracts for the support and relief of such immigrants "*landing*" as "may fall into distress or need public aid." Section 4 required the owners to bear the return cost of aliens not permitted to land. Thus no obligation for their care was assumed by the Government until a favorable decision of their right to enter.

Neither of these acts provided for examination elsewhere than on board ship. And yet during their existence, such removal had been authorized by regulation and practice, with constant collection from shipowners of such *ad interim* charges.

The next act of March 3, 1891 (26 Stat. 1084), was the first comprehensive regulation of the subject, and forms the foundation of all after legislation. Section 1 classifies the aliens denied entry. Section 4, under penalty, prohibits shipowners from soliciting "the immigration of any alien * * * except by ordinary * * * advertisements, etc., stating the sailings * * * and terms * * * of transportation." (This provision is carried into all later acts revealing a purpose to restrict the incoming of aliens. This attitude of Congress necessarily precludes any subtle construction lodging on the Government a liability not clearly imposed.)

Section 8 provided that officers should board vessels and—

"there inspect all * * * aliens, *or* the inspection officers may order a temporary re-

moval of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made—"

expressly providing, however, that "such removal shall not be considered a landing during the pendency of such examination."

Later it declared that "during such inspection, after temporary removal, the superintendent shall *cause* such aliens to be properly housed, fed and cared for." But there was no *express* provision as to who should bear the resulting charges.

Immediately after the passage of this act the shipowners strenuously contended that the above provision relieved them of these charges. The department refused to change the practice, holding that though the act might be read to *conditionally* charge the Government, *in case* a removal were ordered, it was discretionary to either remove or examine on ship, and that it would examine on ship, unless the owners preferred to pay these charges for the sake of off-board examination. (R. 77–78.)

Section 10 provided that—

"all aliens who may unlawfully come * * * shall, if practicable, be immediately sent back on the vessel by which they were brought in" and "that the cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owners of the vessel," etc. (This provision was preserved in the later acts also.)

The contention of the shipowners was renewed in 1894 and 1898; and much correspondence ensued. But the practice remained unchanged, and the regulations were from time to time reissued. All this was known to Congress when it passed the general immigration act of March 3, 1903, wherein was first enacted the present section 16. With a manifest purpose to settle the dispute, Congress *omitted* from the new section all language in old section 8, on which the shipowners had relied; and *preserved* the discretionary power to examine on or off ship, and the provision that removal shall not be considered a landing, on which the Government had relied; and in addition declared that as to every obligation of the owner (save the duty to detain) the case should stand as if the alien were still no board. (We have already quoted the report of the House committee, explaining the purpose of the language used.) Thus explained, the provision appears to be a legislative adoption of the practice obtaining. Thereafter and until the passage of the act of 1907, the department collected, and the owners, *without protest*, paid these charges. Congress reenacted section 16 in the act of 1907, and thereby, according to settled principles, adopted the practical construction *given its language*, during the four preceding years, by the department.

In *United States* v. *Hermanos y Compania*, 209 U. S. 337, 339, this court said—

And we have decided that the reenactment by Congress, without change, of a statute which had previously received long con-

tinued executive construction is an adoption by Congress of such construction. (*United States* v. *Falk*, 204 U. S. 143, 152.) Section 16 contemplates but *one* examination or inspection, to be had in the discretion of the officers, *either on* the ship on arrival, *or elsewhere*, after "temporary removal."

Under the former method, the alien, *while yet on* the ship, is ordered either admitted, deported or detained for later special inquiry. The ship, until the making of that order, necessarily furnishes, and so its owner necessarily pays for, board and any hospital treatment of the alien. *Ergo* the obligation to pay therefor, in case the alien remains on board, *is imposed on the ship owner by the act itself*. In case of removal ordered, the act provides—

"such temporary removal shall not * * * relieve the * * * owners * * * of the vessel * * * from *any* of the obligations, which, in case *such* alien remains on board, would, under the provisions of this act bind said * * * owner."

In effect this clause declares that, though temporarily removed the obligation to furnish and pay for hospital treatment until examination rests on the shipowner to the same extent as if the alien were still on board ship awaiting examination.

And here attention is called to the patent error of the trial court in concluding as to section 16, that—

"It seems clear that the Government *can not* sustain the proposition that the alien

was *theoretically* on the vessel. (205 Fed. 949, 950.)"

As pointed out supra, the House committee said in 1903, that *the very purpose of the language* of the section as above quoted was that the—

"removal should *not affect* the *obligations* imposed by law *upon the vessel* and alien, *who shall be deemed constructively on board ship until lawfully landed.*"

The language admits of no other reasonable meaning; and the refusal of the trial court to accept that view led to erroneous judgment.

The Circuit Court of Appeals held that the only effect of this clause was (1) to preserve the obligation to return the alien, if ordered deported, and (2) to forbid the shipowner to claim that the alien had gained lawful admittance through the order. It did not attempt to explain why, of the many imposed by the act, these two obligations only were kept alive, by a clause reading "shall not relieve from *any* obligation."

The following are some of the obligations imposed: (1) To pay the "head tax" (sec. 1); (2) not to illegally land (sec. 8); (3) to receive the alien when returned to their care (sec. 16); (4) to pay maintenance and treatment, until determination of right to land (sec. 16); (5) to pay cost on land before and after order of deportation, in case of those unlawfully brought (sec. 19); and (6) to return, with a deported helpless alien, the accompanying attendant. These obligations remain in full force after the temporary removal, as if the alien were still

on board. He is deemed on board for *all*, not part purposes. Were all examinations had on shipboard, the duty to pay would be so plain that the owner, furnishing the service, would never think of billing on the Government therefor. The question is simple if we steadily remember that the alien is to be regarded as still on board; as if, for example, it had become impossible to use the ship's hospital, and the service was engaged on an adjacent ship.

The vessel owner bringing the aliens for landing, when he hands the manifest of aliens to the officers, says, in effect, "parati sunt." And if they be not so ready, he must make them so, because he has offered them for examination. If to be inspected on board, his ship's service would be used, as it was on the voyage over seas. If temporarily removed, he must still do so. He brought them over knowing the prerequisites to landing, and agreeing to submit to them, and his duty does not cease till the primary determination of the right to enter.

The last proviso of § 16. This reads:

"Where a suitable building *is used* for the detention and examination of aliens, the immigration officials shall there take charge of *such* aliens, and the * * * owners * * * of the vessels bringing such aliens shall be relieved of the responsibility *for their detention* thereafter until the return of such aliens to their care."

The defendant urged below that this proviso was mandatory, and deprived the officers of discretion to examine on board ship. This

contention is without merit in view of the language of the section and the House committee's explanation of its purpose. There was no purpose to affect the discretion already bestowed but only, *in the event removal should be required*, to have it to the buildings provided. This view is confirmed by reference to the agreed facts, which show that it has been the practice since 1891 to examine first and second cabin passengers on board—only those "not found clearly and beyond doubt entitled to land" and the steerage aliens being ordered to Ellis Island or to hospitals. (R. 48, 56.)

The Court of Appeals erred when it said "the Government officers * * * were, *in the language of the act*, in *charge of the immigrants* in question * * * *for all purposes*."

It read the words "for all purposes" into the proviso, thereby violating a fixed rule of statutory construction. (*United States* v. *Goldenberg*, 168 U. S. 95, 102–3; *United States* v. *Lexington Mills Co.* 232 U. S. 399, 409, 410; *United States* v. *McCord*, 233 U. S. 157–163).

Instead of saying the officers shall "take charge" *for all purposes*, it merely makes them responsible for the alien's detention—a duty which but for the proviso would have rested on the owner. To read "for all purposes" into the proviso, would nullify the preceding clause. Moreover, the "suitable buildings" covered by the proviso are only those "*used for detention and examination*." Private hospitals were *not so used*. On the contrary, the aliens, when cured, were brought *from* these hospitals *by the defendant*, to the Ellis Island

station, *where all* examinations were had. *Here* the immigration officers were stationed, and so in position to prevent escapes; which doubtless led Congress to relieve the steamship owner from responsibility for the safekeeping of aliens *while confined* in *these* buildings. It can not be supposed that Congress intended the Government should assume the burden of safeguarding aliens while being treated in various local hospitals not under Government control. Therefore, the *contention* that this proviso destroyed the discretionary power of removal and placed the immigration officers in charge of the alien for all purposes must, at most, be restricted to the charges on the nineteen aliens treated at Ellis Island.

The Court of Appeals also said that if Congress had meant to impose these charges on the owner it would have *expressly* so provided, as it did in the case of land maintenance cost of deported aliens. (Sec. 19.) This is specious reasoning; but it will not bear analysis. Section 19 deals only with the procedure for, and expense of return of those *to be deported*. And the whole expense feature was covered by the land maintenance and return clause. Section 16, on the other hand, deals not only with *ad interim* expense on removal before examination, but, as well, with at least six other obligations of the owner, all of which, save the single duty to detain, were to be preserved against him despite the removal. It was much easier to declare that *all* obligations, with the one exception covered by the proviso, should re-

main as if the alien were still on board than to specify each duty in detail. And, as appears from the House committee's report, the language was used for that reason.

Both the lower courts assert, without warrant in the record, that the Ellis Island hospital was built from "the head money tax of $4 paid by the companies." It was built in 1892 when the head tax was but 50 cents. (Act of 1882, 22 Stat. 214.)

The tax became $2 first in 1903, and was not raised to $4 until 1907. (32 Stat. 1213.) Even had it been a fact, how could it affect the meaning of language in section 16? Could the adventitious fact that the hospital had been built from a certain source give meaning to words first used eleven years after it had been put to use? If so, had it been built from some other fund, a different meaning would thereby attach to the words. (It will be noted, also, that private hospitals, not built from the fund, were always used for contagious cases.)

Excess in the immigrant fund.—Waiving the fact that the overplus is merely beyond the expenses of regulating immigration, but not beyond that needed for reports, salaries, etc., how does this feature aid interpretation? Accidental results, produced during two years of operation *after* the passage of an act, can not be invoked for such a purpose. Otherwise, if a deficiency had resulted in 1910 and an excess in 1911, we must temporarily change the meaning of the language from time to time as needed.

The suggestion, however, carries the idea that the charges ought to be paid from that fund. It was then available for but three specific uses: (1) To "defray the expenses of regulating the immigration"; (2) "the cost of Federal court reports"; and (3) "the salary of all employees", etc. These charges can not be classed under (2) or (3), and do not fall under (1). This is suggested by the agreed facts which refer to them as "in addition to"; i. e., *outside* of the total expenses of regulating immigration. The limited meaning of the phrase is seen by contrasting the act of 1882 with the present act. The former read:

"To defray (1) the expenses of regulating immigration under this act; (2) for the care of immigrants *arriving* in the United States; (3) for the relief of such as are in distress; (4) and for the *general purposes and expenses* of carrying this act into effect."

These charges, if incurred in 1883, would have been classed under (4) rather than (1) supra. And we must ascribe to clause (1) in the present act the meaning it bore in 1882; while the omission of uses (2), (3), and (4) of the act of 1882, and the substitution of two other uses, shows a clear intention to exclude this use. It is true the fund was by act of March 4, 1909 (205 Fed. 948), diverted into "Miscellaneous receipts" available for larger uses. But this *later* change can not affect the meaning to be given the language used in section 16 *in 1903*. At that time there were but three sources of payment: (1) The Government; (2) the alien; and (3) the ship-

owner. The only Government fund (immigrant fund) was not *then* available. The alien could only be required to pay *if removed on his own application*. Congress meant to lay it upon the owner, and did so, as an obligation he would have borne had the examination been on the ship. The "immigrant fund" might possibly be viewed as *impliedly* devoted to such a purpose provided all other expense connected with the care or maintenance of arriving aliens, pending determination of their right to enter, fell also upon the Government. But obviously there must be plain legislative authority to use public funds for these charges, particularly in view of the act of August 2, 1882 (22 Stat. 188), commonly called the "Passenger act," which requires vessels to provide hospital and other facilities for emigrants.

The contention that our construction suffers the officers to hold ships indefinitely as hospitals is without force. Under the present section 16, as well as all earlier acts, they were privileged to hold her long enough to examine the aliens on board. This inconvenience was a burden knowingly assumed when they undertook the business. They have no vested right to bring them; and must use the privilege upon the conditions imposed by the law or not at all. They must carefully examine them abroad, on receiving them, to make certain they would not later offer those not entitled to land. Only a responsibility born in part of the duty to bear charges will insure care on their part. In-

deed in earlier years, under lesser restrictions, shipowners advertised so that it became necessary to restrict them to escape a flood of undesirables.

The court of first instance sought to distinguish—though without clear purpose—the words "inspection" and "examination" in section 16, insisting that the former described the act if done on board; the latter, if done elsewhere. (205 Fed. 950.) There is no basis for such distinction. The words are synonymous, and used interchangeably in this and the other acts. Witness the following instances: (1) Section 16 provides for a single primary inquiry, either on ship *or* elsewhere. (2) Section 17 (opening clause) requires the "physical and mental *examination*" to be made by "medical officers," and, providing for the cost *thereof*, terms it "medical *inspection*." (3) Section 24 refers to "*examining medical inspector*." (4) Section 8 of the act of 1891 (26 Stat. 1084) provides they may either "there" *inspect*—

"*Or* the *inspection* officers may order a temporary removal * * * for *examination* (elsewhere); * * * and there detain them until a thorough *inspection* is made. But such removal shall not be considered a landing during the *pendency of such examination* * * *. During *such inspection*, after temporary removal, the superintendent shall cause such alien to be properly housed, * * * etc."

There are two phases to each "examination" or "inspection": (1) Inquiry by the

inspector to insure nonexistence of conditions (*other* than medical) described in section 2 of the act; and (2) the mental and physical inquiry by medical officers.

The same court (950) demonstrates that the phrase "while on land," in section 19, has a different meaning from the word "landing," in section 16, presumably to avoid application of the former phrase to these ad interim charges. The argument is wasted because the *whole* section (19) deals only with immigrants who are to be *returned*, and no part of it can be applied to those who are not to be returned but are finally admitted.

This word "landing" in the phrase "but such temporary removal shall not be considered a landing" does, however, furnish a strong argument for the Government. Wherever used it and the word "land" mean a lawful entry. Section 8 of the acts of 1903 and 1907 provides:

"Any person, including the owner * * * of any vessel, who shall *bring into* or *land* in the United States, * * * any alien, not duly admitted, etc."

The function of the owner is to *land* the alien. Until the landing is accomplished that duty is not completely discharged; and he does and should remain liable for his care.

Both lower courts asserted, and it seems conceded, that examination off-board *is for the convenience of the owner*. If so, it ought not to be assumed that in yielding him this benefit the Government shouldered an additional burden or that it surrendered revenue

enjoyed for over a quarter of a century—amounting, as shown by the department records, to over $102,000 in the port of New York for the year 1909 alone—but rather that the owner gaining this benefit at least kept such burden as he theretofore had borne. And this was the purpose of the "obligation" clause, according to the contemporaneous House committee report.

II.

Regulation and usage.

It is conceded the regulation in terms imposes these charges on the owner, no question of its meaning being raised. But it is claimed to be void as "inconsistent with the law." Defendant says the statute does not *expressly* impose this duty on the owner; and as the Government is the only other person that can pay, it must fall on it. This is a non sequitur. Equally might it be said the statute does not expressly impose the duty on the Government, and as the owner is the only other one who could pay, it falls on him.

While it is true that section 16 does not impose these charges *in terms* on the owner, the language (conferring discretion as to removal and saving all obligations against the owner as if the alien were still on board) in any view invites departmental regulation. Some rule of payment being essential, and the act being silent, it was a proper subject for instructions (under section 22) either in the form of written rule or practice long continued.

In *Haas* v. *Henkel*, 216 U. S. 480, this court said:

"Such regulation need not be promulgated in any set form nor in writing. In *United States* v. *McDaniels*, 7 Peters, 114, 115, it was said of departmental regulations that 'of necessity usages have been established in every department of the Government which have become a kind of common law,' etc."

In *United States* v. *Birdsall*, 233 U. S. 223, 234, the court said:

"For this reason * * * it was within the competency of the office to establish regulations and practices having the force of regulation, etc."

The regulations now involved are not additive to, but wholly administrative of the law. (*United States* v. *Antikamnia Chemical Co.*, 231 U. S. 654; *United States* v. *Foster*, 232 U. S. 515.)

As stated in the last-cited case, "the regulation executes the law." In the case at bar this administrative feature is taken care of (1) by written instructions and (2) by usage long continued and unbroken. So persistent was the latter that it endured against every protest, as well while the statute only mentioned shipboard examination, and while the clause in section 8 of the act of 1891 required housing, etc., as since the act of 1903.

Only during the 12 years when the act of 1891 was in effect might it have been fairly argued that it was inconsistent with the law. The trial court closed its eyes to this prolonged usage, giving as its sole reason for not

discussing "practical construction" that "the various *opinions* can not be regarded as practical construction." (205 Fed. 591.)

Even without legislative adoption of executive construction, the section must be so read, because the practice, *so long* adhered to by the departments, demands it. (R. 69 et seq.) In *United States* v. *Johnston*, 124 U. S. 236, 253, this court said:

"In view of the foregoing facts, the case comes fairly within the rule often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, *especially when it has long prevailed*, is entitled to great weight; and should *not be disregarded or overturned*, except for cogent reasons, and unless it be clear that such construction is erroneous (cases)."

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be reversed and the case remanded with direction to dismiss the petition.

FRANK DAVIS, JR.,
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